No. 21A222

In the Supreme Court of the United States

MARK BRNOVICH, in his official capacity as Attorney General of Arizona,
Applicant,
v.
PAUL A. ISAACSON, M.D.; ERIC M. REUSS, M.D., M.P.H.; ARIZONA MEDICAL ASSOCIATION; NATIONAL COUNCIL OF JEWISH WOMEN (ARIZONA SECTION), INC.; and ARIZONA NATIONAL ORGANIZATION FOR WOMEN,
Respondents.

REPLY IN SUPPORT OF APPLICATION FOR PARTIAL STAY

To the Honorable Elena Kagan, Associate Justice and Circuit Justice for the Ninth Circuit

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INTRODUCTION

The Court has repeatedly "required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The right that Respondents assert is the right for a physician (or other third person) to perform an abortion for race-, sex-, or genetic-based reasons. That asserted right is broader than any abortion right ever recognized and has no basis in "[o]ur Nation's history, legal traditions, and practices," and thus Arizona may regulate that right if doing so is rationally related to legitimate state interests. *Id.* at 721, 728.

Respondents make no effort to ground the right they assert in the Nation's history, legal traditions, or practices. They skip over the predicate question regarding the nature of their asserted right, instead assuming it is entitled to heightened protection under *Roe* and *Casey*. But, as Applicant has explained, neither decision recognized Respondents' asserted right. *Roe* implicitly rejected it and *Casey* did not consider it. Two Justices have already acknowledged as much. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1792 (2019) (Thomas, J., concurring); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health* ("*PPINK*"), 917 F.3d 532, 536 (7th Cir. 2018) (Easterbrook, J.,

dissenting from the denial of rehearing en banc, joined by Barrett, J.).[1] And multiple circuit judges—while mistakenly concluding that *Roe* and *Casey* apply—have lamented being compelled to recognize Respondents' asserted right. *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682, 694 (8th Cir. 2021) (Erickson, J., concurring); *PPINK v. Comm'r of Ind. State Dep't of Health*, 888 F.3d 300, 310-11 (7th Cir. 2018) (Manion, J., concurring in the judgment in part and dissenting in part). Respondents' position (and the district court injunction at issue) relies on an *expansion* of the right to abortion beyond any precedent of this Court.

Applicant has clearly satisfied the standard for issuance of a stay pending further appellate proceedings. There is a probability that at least four justices will vote to grant certiorari. The Ninth Circuit cannot affirm the district court's injunction without furthering and creating circuit splits. But even if the Ninth Circuit could affirm without doing so, the weight of the issues presented here—as in all of the Court's recent abortion cases—will alone justify certiorari. Respondents' attempt to minimize the existing circuit splits is both inaccurate and inapposite.

There is also a fair prospect that the Court would uphold the Reason

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[1] *See also Preterm-Cleveland v. McCloud*, 994 F.3d 512, 536 (6th Cir. 2021) (en banc) (Sutton, J., concurring) ("I do not find this case difficult as a matter of federal constitutional law. The United States Supreme Court has never considered an anti-eugenics statute before."); *id.* at 544 (Bush, J., concurring) ("[T]he Supreme Court has not held that the undue-burden standard should apply to a law that regulates eugenic abortions.").

Regulation.[2] Because the asserted right to sex-, race-, or genetic-selective abortion is novel, unlimited, and not grounded in history, legal traditions, or practices, the Reason Regulation need only satisfy rational basis, and it easily does so. Even if *Casey* were expanded to apply here, the Reason Regulation—by only prohibiting an abortion by a physician (or other person) who knows that a genetic abnormality is the sole reason for the abortion—does not impose a ban or undue burden on abortion. The Reason Regulation is also not facially vague: the Regulation contains a knowing mens rea requirement and an ascertainable standard allowing reasonable doctors to determine in the mine run of cases whether a genetic abnormality exists. Respondents' merits responses ignore most of Applicant's primary arguments.

Lastly, Arizona will suffer irreparable harm in the absence of a stay. Currently, Arizona is unable to prohibit physicians and others from performing abortions solely because an unborn child has been diagnosed with a genetic abnormality. The injunction thwarts Arizona's multiple compelling interests in prohibiting such abortions. In response, Respondents take issue with Applicant's focus on the Reason Regulation, which is the core of the legislation at issue, and circularly argue that Arizona will not suffer irreparable harm because the Reason

[2] The term "Reason Regulation" is used herein in the same manner as in the Application and refers to A.R.S. § 13-3603.02(A)(2). As discussed further below, this is the core provision of the law that the Legislature enacted, and it operates independently of the other provisions that plaintiffs below also challenge.

Regulation is unconstitutional. Respondents' irreparable harm arguments fall flat given the gravity of the issues here.

ARGUMENT

I. RESPONDENTS' CLAIMS ARE UNLIKELY TO SUCCEED.

1. Respondents' claim that the Reason Regulation violates substantive due process is not likely to succeed. The Reason Regulation is subject to rational basis review because the right that Respondents' assert is novel and is not subject to heightened review under *Roe* and *Casey*. Even if *Roe* and *Casey* apply, the Reason Regulation (as the district court held) does not impose a ban on pre-viability abortion, and Respondents otherwise failed (by putting all of their eggs in the "ban" basket) to establish an undue burden, thereby resulting in rational basis review. The Reason Regulation satisfies strict scrutiny, let alone rational basis.

Respondents expend little effort disputing any of this. They do not attempt to establish that the right they assert is anything other than novel; they do not attempt to establish that the Reason Regulation imposes a ban; they do not attempt to establish that the district court actually made the missing findings Applicant has identified as fatal to the district court's undue burden conclusion (or that the record contains the evidence to do so); and they do not contest that the Reason Regulation is supported by compelling state interests.

As to the applicability of *Roe* and *Casey*, Respondents point to a single

footnote in the Court's decision in *Colautti v. Franklin* as proof that the Court has contemplated that some patients may choose an abortion based on certain fetal conditions. Contrary to Respondents' characterization, the information contained in that footnote was part of the plaintiffs-appellees' argument that the statute at issue was overbroad. 439 U.S. 379, 389 (1979) ("This provision is also said to be unconstitutionally overbroad . . . ."). The Court clearly indicated just a short while later in the opinion that it would *not* be addressing that overbreadth argument. *Id.* at 390 ("[W]e find it unnecessary to consider appellees' alternative arguments based on the alleged overbreadth of § 5(a)."). That a stray sentence in a footnote about evidence submitted in support of an argument never addressed is the best Respondents can muster to support the application of *Roe* and *Casey* speaks volumes. Of course, nothing in *Colautti* actually addresses that *Roe* rejected the notion that a woman "is entitled to terminate her pregnancy . . . for whatever reason she alone chooses." *Roe v. Wade*, 410 U.S. 113, 153 (1973).

Respondents also take issue with Applicant's statement that Respondents did not argue undue burden below. To establish otherwise, they cite a single footnote in their preliminary injunction motion where they argued that "[t]he undue burden test does not apply to the Reason Ban because it is not a regulation, but rather an outright ban on abortion care." ECF No. 10 at 11 n.6. That is certainly an odd way to have "consistently" argued undue burden.

Otherwise, Respondents argue that stay relief is not justified because the district court applied the right test and Applicant is only seeking a partial stay. But the district court did not apply the right test—it applied heightened scrutiny under *Casey* when rational basis should apply. Plus, simply asking whether the district court applied the right test takes an overly myopic approach to the likelihood of success requirement, which analyzes whether, *if certiorari is granted*, the Applicant is likely to succeed. Simply asking whether the lower court applied *Casey* does not adequately answer that question. After all, the Court has reversed in favor of petitioner even where the lower courts applied *Casey*. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 144 (2007) ("The Court of Appeals concluded further that the Act placed an undue burden on a woman's ability to obtain a second-trimester abortion."); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2303-04 (2016) (reversing the Fifth Circuit's application of *Casey*).

That Applicant is seeking only to stay the district court's injunction as to the Reason Regulation also makes no difference. The Reason Regulation comprises the core of the legislation, and, contrary to Respondents' claim, it operates independently of the other provisions in S.B. 1457 that Respondents challenge, which primarily implement the Reason Regulation through reporting and informed consent requirements. The Reason Regulation is also the primary provision in the legislation that Applicant is tasked with enforcing through injunctive relief in state

court. *See* S.B. 1457 § 2 (A.R.S. § 13-3603.02(C)). Respondents' gripe about the narrow scope of the relief requested is particularly misplaced considering the Court has often vacated stays of district court injunctions, including only in part, in favor of abortion providers. *See Whole Woman's Health v. Lakey*, 574 U.S. 931 (2014) (vacating in part Fifth Circuit stay of district court preliminary injunction); *June Med. Servs., L.L.C. v. Gee*, 577 U.S. 1185 (2016) (vacating Fifth Circuit stay of district court preliminary injunction).

2. Respondents' claim that the Reason Regulation is, on its face, unconstitutionally vague is also not likely to succeed. When it comes to facial vagueness challenges, the Court only sustains such challenges when there is an "absence of any ascertainable standard for inclusion and exclusion." *Smith v. Goguen*, 415 U.S. 566, 578 (1974); *United States v. Powell*, 423 U.S. 87, 92 (1975). By prohibiting the performance of an abortion only when a physician knows that the sole reason it is sought is because of the presence or presumed presence of a genetic abnormality (a defined term), the Reason Regulation contains an ascertainable standard for inclusion and exclusion.

Respondents do not seriously contend that a reasonable physician will not in the mine run of cases be able to distinguish whether conduct is proscribed by the Reason Regulation or not. Respondents do not contest that in over 98% of abortions performed in 2019 (the only year for which there is record evidence) the Reason

Regulation's lack of application would have been obvious. And Respondents do not contest that the Reason Regulation can be further narrowed through as-applied adjudication in state court.

Instead, Respondents spill much ink arguing against strawmen. They argue first that they are entitled to bring a facial challenge, citing *Johnson* and *Dimaya*. It is not clear, however, that the vagueness analysis in those cases applies outside of the "exceptional circumstances" presented therein. *See Copeland v. Vance*, 893 F.3d 101, 111 n.2 (2d Cir. 2018). In any event, Applicant does not argue that Respondents cannot bring a facial challenge; instead, Applicant asserts that Respondents cannot satisfy the high standard for such challenges established in *Smith*, *Powell*, *Coates v. Cincinnati*, and *Grayned v. City of Rockford*. Appl. at 31. Respondents do not suggest a different standard or explain how the Reason Regulation fails under those cases.

Respondents also argue vagueness based on provisions in S.B. 1457 not at issue in the Application. Respondents again claim that the Reason Regulation is somehow intertwined with those provisions, which is not true. In reality, the Reason Regulation is perfectly capable of standing on its own as an enforceable restriction on discriminatory abortions. And Respondents do not establish that the Reason

Regulation standing alone is facially vague under the Court's precedents.[3]

Finally, Respondents argue that the Court's precedents do not establish that a scienter requirement always cures vagueness. To the contrary, the Court has repeatedly held that a scienter requirement alleviates vagueness. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010); *Screws v. United States*, 325 U.S. 91, 102 (1945). But Respondents do not cite a single decision from the Court—not one—supporting the district court's actual conclusion that including a scienter requirement *increases* vagueness. That conclusion, if affirmed, could call into question every law—there are numerous of them[4]—requiring proof that an individual knew another individual's motives, if not all statutes containing a knowing scienter requirement.

II. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WOULD VOTE TO GRANT CERTIORARI.

1. The circuits are currently split on whether state laws prohibiting abortion for discriminatory reasons violate providers' substantive due process rights. The Sixth Circuit, sitting en banc, has expressly disagreed with the Seventh Circuit's

[3] Applicant disputes that any of the other provisions in S.B. 1457, standing alone or when considered together, are facially vague. But that issue is not presented here.
[4] For example, federal conspiracy laws require proof of a "meeting of the minds." *United States v. Johnston*, 789 F.3d 934, 940 n.1 (9th Cir. 2015).

analysis of that issue, which is similar to the Eighth Circuit's analysis (at least for now). *See Preterm-Cleveland*, 994 F.3d at 529-30.[5]

Respondents attempt to write *Preterm-Cleveland* off as involving "a different law and a different record." Resp. at 20. But it is not clear what Respondents think was different about the law and record in *Preterm-Cleveland*. The law there was broader in several respects than the Reason Regulation—the Ohio law bans abortion where the provider has knowledge that a pregnant woman is seeking an abortion, *in whole or in part*, because there is any reason to believe an unborn child has Down syndrome. 994 F.3d at 517. Still, the Sixth Circuit upheld that law. As far as the record goes, the Arizona Legislature expressly relied on the record in *Preterm-Cleveland* in passing S.B. 1457. *See* S.B. 1457 § 15.

The Ninth Circuit also cannot affirm the district court's injunction as to the Reason Regulation without furthering the split on whether the *Hellerstedt* majority or *June Medical* concurrence sets forth the applicable standard under *Casey*. Even if the Ninth Circuit, as Respondents suggest, takes the district court's approach and analyzes the Reason Regulation under both standards, lower courts in the Ninth Circuit will then feel bound to do the same in every future case, which is really no

[5] Notably, the plaintiffs in *Preterm-Cleveland* did not seek this Court's review of the en banc court's decision.

different than just adopting the *Hellerstedt* analysis of benefits and burdens. Respondents' position that employing both tests avoids the split makes no sense.

As to vagueness, Respondents do not dispute that the en banc Sixth Circuit is likely to hold that Tennessee's reason regulation is not facially vague. They speculate instead that the Sixth Circuit's holding will be distinguishable from the Ninth Circuit's because the Tennessee law applies only to fetal Down syndrome, while the Reason Regulation applies more broadly to all genetic abnormalities. Respondents ignore, however, that for the Ninth Circuit to affirm, it will need to conclude that the Reason Regulation is vague despite that it clearly applies to the most common genetic abnormalities that are easily diagnosed and do not result in death of an unborn child within three months of birth, such as Down syndrome. This will necessarily put the Ninth Circuit in conflict with the Sixth Circuit.

Finally, Respondents do not dispute that the Seventh Circuit only sustains a facial vagueness challenge where the statute at issue has a "discernible core" that is "understandable by persons of ordinary intelligence and not subject to arbitrary enforcement." *Planned Parenthood of Ind. & Ky., Inc. v. Marion Cnty. Prosecutor*, 7 F.4th 594, 606 (7th Cir. 2021). Respondents do not explain how the Ninth Circuit can affirm that the Reason Regulation is facially vague while employing that same standard (because it cannot). Respondents again argue primarily that the underlying state law and facts in *Marion County Prosecutor* are different than here. Under

Respondents' approach to certiorari—one in which the Court will not grant where legal standards across circuits differ but the statutes and facts analyzed are not identical—no circuit split could ever justify certiorari. Fortunately, that view does not reflect the Court's actual practice, which accepts that certiorari is justified when the legal standards circuits employ are different, even if the underlying law and facts analyzed using the standards are not identical.

2. Even in the absence of a circuit split, the issues presented here—including whether there is a fundamental substantive due process right to perform discriminatory abortions—are sufficiently important to justify certiorari. In fact, the Court routinely grants certiorari in abortion cases without indicating the existence of a circuit split, including where vagueness issues are presented. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021); *Whole Woman's Health v. Jackson*, —S. Ct.—, 2021 WL 5855551, at *5 (Dec. 10, 2021); *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2116-17 (2020); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2303-04 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 132-33 (2007); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 325-26 (2006); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe*, 410 U.S. at 120-22.

III. ARIZONA WILL CONTINUE TO SUFFER IRREPARABLE HARM IF THE REASON REGULATION REMAINS ENJOINED.

Unless stayed, the district court's preliminary injunction of the Reason Regulation will continue to cause Applicant and the State of Arizona irreparable harm by preventing enforcement of a duly-enacted state law. *See Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers); *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018). In so doing, the preliminary injunction prevents Arizona from remedying discriminatory practices towards those with disabilities, protecting the integrity and ethics of the medical profession, and promoting the life and dignity of the unborn. *See Gonzales*, 550 U.S. at 157, 163; *cf. Glucksberg*, 521 U.S. at 729 ("[T]he States may properly decline to make judgments about the quality of life that a particular individual may enjoy." (internal quotations omitted)).

Respondents' primary rejoinder is that irreparable harm will not occur because the Reason Regulation is unconstitutional. For the reasons explained in the Application and herein, that argument is not likely to succeed.

Respondents also criticize Applicant's request for a stay related only to the Reason Regulation and not a broader stay applying to the rest of S.B. 1457. Respondents assert that the Reason Regulation is intertwined or interconnected with those other provisions. Again, Respondents are wrong—as explained, the Reason Regulation is perfectly capable of standing alone. Respondents also argue that the failure to seek the broadest stay possible undercuts Applicant's arguments about

harm to the State's sovereign interests. Not so. The Reason Regulation constitutes the core of the legislation, which is demonstrated by the legislative findings included therein, which are focused on the utility of the Reason Regulation. *See* S.B. 1457 § 15. Respondents even admit that the "[o]ther sections of [S.B. 1457] also depend upon and incorporate Section 2." Resp. at 4. The State also expressed its sovereign intent that the Reason Regulation be severed from the rest of the legislation if any other provision is held invalid. *See* S.B. 1457 § 18. And the Court has rejected the notion that equitable relief is an all-or-nothing proposition, even in the abortion context. *See Ayotte*, 546 U.S. at 323 ("We hold that invalidating the statute entirely is not always necessary or justified, for lower courts may be able to render narrower declaratory and injunctive relief.").

Respondents also claim that Applicant is asking the Court to re-write the statute. This is also not true. Applicant simply asks the Court to lift the preliminary injunction as to the Reason Regulation, such that Applicant may enforce it as written.

Lastly, Respondents suggest that Arizona will not suffer irreparable harm because it remains free to pursue its interests in other ways. The only concrete suggestion Respondents offer is "a public-information campaign." *See* Resp. at 16 n.4. Arizona, however, is not required to employ other means of furthering its interests when the means it already chose—the Reason Regulation—is narrowly tailored to simultaneously serve all of Arizona's compelling interests in avoiding

coercive abortion practices, protecting the ethics of the medical profession, and preventing abortion from being used for discriminatory or eugenic reasons. *See Preterm-Cleveland*, 994 F.3d at 527.

On the other side of the scale, Respondents have not established that anyone will suffer irreparable harm if the preliminary injunction is stayed as to the Reason Regulation. Respondents still have not identified a single patient who would have been, or will be, unable to obtain an abortion because of the Reason Regulation. Respondents still have not alleged that they perform race-, sex-, or genetic-selective abortions, or that they plan to do so. Respondents still do not allege that knowing the reason why an abortion is sought is medically necessary. In fact, Respondents admit that pregnant women seek abortions for a myriad of reasons and often do not disclose those reasons to their physician. *See* ECF No. 7-2 at 34-35. Respondents have also disclaimed any argument that there are women in Arizona who will only obtain a pre-viability abortion if they are able to disclose their motives for doing so to a physician. App. 18 n.13. Thus, the equities here tip sharply in favor of Applicant's request for a partial stay of the district court's preliminary injunction.

CONCLUSION

Applicant respectfully asks this Court to enter a partial stay of the district court's preliminary injunction of the Reason Regulation pending completion of further proceedings in the court of appeals and, if necessary, this Court.

December 22, 2021

Respectfully submitted,

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